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No. 67

In the Supreme Court of the United States

OCTOBER TERM, 1967

JOHN W. TERRY
v.
STATE OF OHIO

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OHIO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ERWIN N. GRISWOLD,
Solicitor General,
FRED M. VINSON, JR.,
Assistant Attorney General,
RALPH S. SPRITZER,
Assistant to the Solicitor General,
BEATRICE ROSENBERG,
IRVING H. PERLMUTTER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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INTEREST OF THE UNITED STATES

Although there is no federal statute comparable to the so-called "stop and frisk" laws adopted in many States, the United States has a direct interest in the definition of the power of law enforcement officers to detain persons without formal arrest in the course of investigating crime. Federal agents, although they do not exercise the broad powers of local police, are not infrequently confronted with situations where effective law enforcement in the areas within their jurisdiction would require them to stop and detain persons for a limited period of time in order to obtain and verify information. Also, of course, investigations by local police frequently produce evidence of

federal crime. The question whether such evidence was lawfully obtained in the first instance has obvious consequence for federal law enforcement.

We are filing our brief in the *Terry* case since its context is not unlike that which is apt to characterize a typical federal case; that is to say, it concerns the general powers of law enforcement officials and does not turn on a specific statutory definition of police authority. The fundamental question, as we view it, is whether it is consistent with the Fourth Amendment's guaranty of the "right of the people to be secure in their persons" against "unreasonable searches and seizures" to recognize a right of law enforcement officers to stop and detain a person for a limited period for the purpose of investigation. We urge that such a limited detention need not be regarded as an arrest, and that therefore the basis for such detention need not satisfy the standard of probable cause which would have to be met in order to secure a warrant of arrest. The Fourth Amendment guaranty against unreasonable searches is satisfied if the detention is reasonable under the circumstances, which necessarily must vary from situation to situation. This is not to argue that the Fourth Amendment is inapplicable to police conduct fairly described by the term, "stop and frisk"; rather, it is to say that a lesser showing will meet the constitutional test of reasonableness in the case of a brief detention on the street than in the case of a conventional arrest. If a right of limited detention does exist, we suggest further that a law enforcement officer has the right to pat down the suspect's outer clothing in order to determine whether

he possesses a weapon, assuming that this step appears reasonably necessary for the detaining officer's self-protection.

I. THE FOURTH AMENDMENT PERMITS REASONABLE LIMITED DETENTION FOR INVESTIGATION

A. A DISTINCTION MAY VALIDLY BE DRAWN UNDER THE FOURTH AMENDMENT BETWEEN ARRESTS AND LIMITED DETENTIONS FOR INVESTIGATION

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

The heart of the problem is whether the limited "seizure" of the person involved in a brief detention by police for investigation is equivalent to the seizure under a warrant for which the Fourth Amendment requires probable cause. This is often phrased in terms of whether such seizure should be deemed an arrest. However mere reference to terminology does not resolve the issue. The term arrest—which does not appear in the Fourth Amendment—has different shades of meaning in differing contexts. As was said in *United States* v. *Bonanno*, 180 F. Supp. 71, 77 (S.D. N.Y.), reversed on other grounds *sub nom. United States* v. *Bufalino*, 285 F. 2d 408 (C.A. 2):

> In dealing with words there is always a temptation to allow them to become separated from

> their objective correlatives in the everyday world, and to treat them as if they have, or ought to have, one single simple meaning, unaffected by the contexts in which they occur and divorced from the world of things and events which give them their content and justification.
>
> "Arrest" is just such a word, not only because it is necessarily unspecific and descriptive of complex, often extended processes, but because in different contexts it describes different processes, each of which has built up, in both legal and common parlance, sharply divergent emotional connotations.

An arrest under a warrant of arrest involves more than the mere stopping of a person on the street or in a car; even when the stopping is by a police officer. An arrest under a warrant is for the purpose of bringing the individual "before a court, body or official or of otherwise securing the administration of the law." Perkins, *The Law of Arrest,* 25 Iowa L. Rev. 201 (1940); Hall, *Law and Government, The Law of Arrest,* 1–4 (2d ed. 1961). In its criminal aspect, it is the taking of a person into custody so that he may be available to answer for the commission of a crime.[1] Similarly, an arrest without a warrant for a specific crime is not only to restrain the individual, but to take him into custody to answer criminal charges. For that

[1] See 1 Varon, *Searches, Seizures and Immunities* 59 (1961); 2 Blackstone's *Commentaries* 234 (1866 ed.); 1 Chitty's Criminal Law 11 (5th ed. 1847); Perkins, *The Law of Arrest,* 25 Iowa L. Rev. 201 (1940); Note, *Detention, Arrest, and Salt Lake City Police Practices,* 9 Utah L. Rev. 593, 598 (1965); LaFave, *Arrest* 4 (1965); Tiffany, McIntyre & Rotenberg, *Detection of Crime* 9 (1967); Note, *Philadelphia Police Practices and the Law of Arrest,* 100 U. Pa. L. Rev. 1182, 1186 (1952); American Law Institute, *Restatement, Torts* 2d § 112 (1965).

kind of arrest—with or without a warrant—there must be probable cause.

A limited detention in the course of a police investigation does not contemplate the bringing of an individual into court to answer to specific charges. No warrant of a court would therefore issue for such an investigation. We submit that the Fourth Amendment's requirement that "no Warrant shall issue, but upon probable cause" is not directed to this type of detention—the reason being that such detention is not equivalent to a detention under a warrant. The Fourth Amendment does apply, to be sure, insofar as it guarantees the right of the people to be secure from unreasonable search and seizure of any kind. "The use of the word 'unreasonable,' in this (Fourth) Amendment," Mr. Justice Black has observed, "means, of course, that not *all* searches and seizures are prohibited. Only those which are *unreasonable* are unlawful." Black, *The Bill of Rights,* 35 N.Y.U. L. Rev. 865, 873 (1960) (emphasis in original). See also the comment of Mr. Justice Stewart in *Elkins* v. *United States,* 364 U.S. 206, 222. In our view, both history and the practicalities of current law enforcement support the conclusion that a police officer's power to detain, if carefully exercised in the light of the circumstances, is reasonable and thus consistent with the Fourth Amendment.

B. A LIMITED POWER OF DETENTION FOR LAW ENFORCEMENT PURPOSES HAS HISTORICAL BASIS AND STRONG JUSTIFICATION IN THE NEEDS OF OUR SOCIETY

At the time the Fourth Amendment was adopted, the particular evil which concerned the advocates of

the Bill of Rights was the abuse represented by the general warrant, only recently outlawed in England by case law and statute. *Wilkes* v. *Wood,* Lofft 1, 98 Eng. Rep. 489 (Common Pleas 1763); *Entick* v. *Carrington,* 19 Howell's State Cases 1030 (K.B. 1765); Lasson, *The History and Development of the Fourth Amendment* 48–50 (1937). The Fourth Amendment does, of course, go beyond that particular evil in protecting the people from any unreasonable search and seizure. However, there is no indication that normal law enforcement techniques of the period were regarded as within its prohibitions. We recognize that it is difficult to draw a sharp analogy to conditions existing at the time of the adoption of the Fourth Amendment; modern police departments are a product of the 19th century. However, in England and in the Colonies,[2] there

[2] For example, the right of "watchmen" to stop and detain strangers at nighttime was established by statute in Massachusetts as early as 1658 and continued into the 20th century. See *Massachusetts Colonial Laws 1660–1672*, p. 198 (1889). As reenacted in 1797, "watchmen" were charged with the duty to

> * * * see that all disturbances and disorders in the night shall be prevented and suppressed; and to examine all persons whom they shall see walking abroad in the night after ten o'clock, and whom they have reason to suspect of any unlawful intention or design, of the business abroad at such season, and whither they are going; and in the case they give not reasonable satisfaction therein, then to secure, by imprisonment or otherwise, all such disorderly and suspicious persons, to be safely kept until morning; then to carry them before one of the next Justices of the Peace, to be examined and proceeded against according to the nature of their offenses as is by law provided.

2 Perpetual Laws of Massachusetts 1788–1799, Ch. 82, Sec. 2, p. 410.

A similar system of watchmen prevailed in colonial New York. See Costello, *History of the New York Police* (1885), chapters 2–4.

was a system of watchmen dating back to the Norman kings. The watchmen had a role akin to the peace-keeping functions of a police department.[3]

As pointed out in Warner, *The Uniform Arrest Act*, 28 Va. L. Rev. 315, 319 (1942), such watchmen were deemed to have the power to detain persons, at least at night, until they could account for their presence. This power was recognized in *Lawrence* v. *Hedger*, 3 Taunt. 13 (Common Pleas 1810), involving an action for false imprisonment by an individual who had been walking through the streets of London at night when stopped by a watchman. The plaintiff was taken by the watchman to a watch-house where the defendant, a parish officer, asked him his name and the reason for carrying his bundle at night. Not satisfied with the replies, the defendant committed plaintiff to prison for the night. The court found for the defendant. Chanbre, J., concurring, found that the suspicion for detaining plaintiff was not groundless, and that "it is highly necessary that they [watchmen] should have such a power of detention * * *. We should be very sorry if the law were otherwise." 3 Taunt at 15. There is no reason to believe that similar authority was not commonly exercised by peace-keeping officers in the colonies.

With growing industrialization and urbanization in the 19th and 20th centuries, the idea of the modern police force took hold—a force expected not only to solve crimes, but also to maintain order and to deter

[3] It was not until 1829 that the first police force was formed in London. 3 Radzinowicz, *A History of English Criminal Law* 109–112 (1948).

their commission. Younger, *Stop and Frisk: Say it Like it is,* 58 J. Cir. L., C. & P.S. 293, 299 (1967); Note, *The Law of Arrest: Constitutionality of Detention and Frisk Acts,* 59 N.W. U. L. Rev. 641, 652 (1965). The power to conduct on-the-spot inquiry is central to the performance of the protective role. As the New York Court of Appeals said in *People* v. *Rivera,* 14 N.Y. 2d 441, 201 N.E. 2d 32, 34; 252 N.Y.S. 2d 458, 461: "Prompt inquiry into suspicious or unusual street action is an indispensible police power in the orderly government of large urban communities."

Mr. Justice Burton, who in his early career served for five years as the mayor of one of our largest cities, stated in similar vein (concurring in *Brinegar* v. *United States,* 338 U.S. 160, 179–180):

> Government agents have duties of crime prevention and crime detection as well as the duty of arresting offenders caught in the commission of a crime or later identified as having committed a crime. The performance of the first duties are as important as the performance of the last. * * *

The indispensability of some authority to detain for purposes of limited inquiry has been universally acknowledged by our courts, including the federal courts, *e.g., Trusty* v. *Oklahoma,* 360 F. 2d 173 (C.A. 10); *Wilson* v. *Porter,* 361 F. 2d 412 (C.A. 9); *Busby* v. *United States,* 296 F. 2d 328 (C.A. 9), certiorari denied, 369 U.S. 876; *United States* v. *Vita,* 294 F. 2d 524 (C.A. 2), certiorari denied, 369 U.S. 823; *Trilling* v. *United States,* 260 F. 2d 677 (C.A. D.C.); *Lee* v. *United States,* 221 F. 2d 29 (C.A.D.C.).

Moreover, it seems appropriate to add that the citizen called upon to respond to such limited inquiry does not suffer the obloquy which may be associated with an arrest. Rather, he is performing the ordinary civic duty, familiar in all organized societies, to provide information in aid of law enforcement. See *Miranda* v. *Arizona*, 384 U.S. 436, 478.

Henry v. *United States*, 361 U.S. 98, is not to the contrary. In that case, the prosecution conceded in the lower courts that an arrest took place when federal agents stopped the car which they were pursuing. That concession was accepted by this Court as the basis of its decision. However, as the Court observed, the government had made clear that it intended to argue in a subsequent case (*Rios* v. *United States*, 364 U.S. 253) that arrests do not necessarily occur each time an individual is detained. 361 U.S. at 103, note 7. In *Rios*, this Court implicitly ruled that *Henry* was not a sweeping decision, eliminating all power on the part of police officers to detain suspects. For if *Henry* had disposed of this issue, there would have been no need in *Rios* to remand for a determination of the precise time that the arrest occurred. See 364 U.S. at 262. In short, detention, as such, is not unreasonable. When the proper circumstances are shown, it may be reasonable and within the ambit of the Fourth Amendment.

C. THE TEST OF THE POWER TO DETAIN MUST BE REASONABLENESS UNDER THE CIRCUMSTANCES

To say that the Fourth Amendment does not, *per se*, condemn a brief detention for investigation is not to argue that the police should be at large or to denigrate

the role of the Amendment. It is to say only that the Fourth Amendment is not an absolute and that its prohibition is aimed at *unreasonable* searches and seizures. The power of limited detention which we support is one which must be carefully circumscribed, and it is the function of the courts, in keeping with their tradition, to confine it within proper bounds—to chart the course between the recognized danger of police abuse on the one hand and the not insignificant danger of police paralysis on the other.

Many attempts have been made to formulate a standard governing a limited form of detention. Terms such as "reasonable cause to investigate",[4] "reasonable grounds to suspect",[5] "reasonable grounds for inquiry",[6] "reasonable suspicion",[7] "founded suspicion"[8] and "circumstances suggestive of the possibility of violation of criminal law"[9] have been proposed or

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[4] Younger, *Stop and Frisk: Say it Like it is*, 58 J. Cr. L., C. & P.S. 293 (1967); *Brinegar* v. *United States* 338 U.S. 160, 179. See also *United States* v. *Vita*, 294 F. 2d 524, 533 (C.A. 2), certiorari denied, 369 U.S. 823; *Trilling* v. *United States*, 260 F. 2d 677, 701.

[5] Warner, *The Uniform Arrest Act*, 28 Va. L. Rev. 315, 321 (1942); Note, *The Law of Arrest: Constitutionality of Detention and Frisk Acts*, 59 N.W. U. L. Rev. 641, 656 (1965); *Commonwealth* v. *Lehan*, 347 Mass. 194, 197 N.E. 2d 840, 845; *United States* v. *Thomas*, 250 F. Supp. 771, 784 (S.D.N.Y.).

[6] Brief for the United States p. 11, *Rios* v. *United States*, No. 52, O.T., 1960.

[7] N.Y. Code Crim. Proc. 180(a) (McKinney Supp. 1964); Leagre, *The Fourth Amendment and the Law of Arrest*, 54 J. Cr. L., C. & P.S. 393, 413 (1963); *Commonwealth* v. *Hicks*, 209 Pa. Super. 1, 223 A. 2d 873, 876; *Wendleboe* v. *Jacobson*, 10 Utah 2d 344, 353 P. 2d 178, 181.

[8] *Wilson* v. *Porter*, 361 F. 2d 412, 415 (C.A. 9).

[9] *State* v. *Hope*, 85 N.J. Super. 551, 205 A. 2d 457. See also, *State* v. *Chronister*, 353 P. 2d 493 (Okla.).

applied. Recognizing the problems encountered in articulating a concept that lies somewhere between probable cause and bare suspicion, the American Law Institute's Draft for a Model Code of Pre-Arraignment Procedure, Section 2.02(2) (1965) has avoided the adoption of a specific term and has proposed a guideline: detention by a law enforcement officer is proper when "a person is observed in circumstances which suggest that he has committed or is about to commit a felony or misdemeanor, and such action is reasonably necessary to enable the officer to determine the lawfulness of that person's conduct * * *." The key word in the definition is "circumstances". The lawfulness of a detention should be considered in the light of the particular circumstances as they confront the responsible persons immediately on the scene. One judge has commented that "[s]weeping generalities ought not to be indulged in, and the focus should be on the facts of the particular case." *United States* v. *Bonanno,* 180 F. Supp. 71, 83 (S.D.N.Y.), reversed on other grounds *sub nom. United States* v. *Bufalino,* 285 F. 2d 408 (C.A. 2). Courts and commentators have suggested a number of factors which should be considered in determining whether a detention is proper. They include the following:

1. The time of day.[10]

[10] *Busby* v. *United States,* 296 F. 2d 328 (C.A. 9), certiorari denied, 369 U.S. 876; *Bell* v. *United States,* 280 F. 2d 717 (C.A.D.C.); *Commonwealth* v. *Lehan,* 347 Mass. 197, 196 N.E. 2d 840; *State* v. *Harris,* 265 Minn. 260, 121 N.W. 2d 327; *Wendleboe* v. *Jacobson,* 10 Utah 2d 344, 353 P. 2d 178; Tiffany, McIntyre and Rotenberg, *Detection of Crime* 19 (1967); *Nicholson* v. *United States,* 355 F. 2d 80 (C.A. 5), certiorari denied, 384 U.S. 974.

2. The place where the suspect is observed.[11]

3. The incidence of crime in the immediate neighborhood.[12]

4. The law enforcement officer's prior knowledge of the suspect.[13]

5. The appearance of the suspect; *i.e.*, whether he resembles someone whom the police are seeking.[14]

6. The pre-detention conduct of the suspect and his companions.[15]

7. The experience of the law enforcement officer.[16]

8. The seriousness of the suspected offense.[17]

9. The necessity for immediate investigative activity.[18]

See, generally, Tiffany, McIntyre and Rotenberg, *Detection of Crime*, ch. 2 (1967); *Arnold* v. *United States*, 382 F. 2d 4, 7 (C.A. 9).

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[11] *State* v. *Freeland*, 255 Iowa 1334, 125 N.W. 2d 825.

[12] *Ellis* v. *United States*, 264 F. 2d 372 (C.A.D.C.), certiorari denied, 359 U.S. 998; *Commonwealth* v. *Lehan*, *supra*, note 10; *State* v. *Chronister*, 353 P. 2d 493 (Okla); *Trusty* v. *Oklahoma*, 360 F. 2d 173 (C.A. 10).

[13] *Commonwealth* v. *Lehan*, (*ibid.*), *State* v. *Chronister*, (*ibid.*); *Brinegar* v. *United States*, 338 U.S. 160, 170.

[14] *Gilbert* v. *United States*, 366 F. 2d 923 (C.A. 9), certiorari denied, 388 U.S. 922; *Ellis* v. *United States*, *supra*, note 12; *Goldsmith* v. *United States*, 277 F. 2d 335 (C.A.D.C.), certiorari denied *sub nom. Carter* v. *United States*, 364 U.S. 863; *Rodgers* v. *United States*, 362 F. 2d 358 (C.A. 8).

[15] *Wilson* v. *Porter*, 361 F. 2d 412, 414 (C.A. 9); *United States* v. *Katz*, 238 F. Supp. 689 (S.D.N.Y.); *United States* v. *Thomas*, 250 F. Supp. 771, 775 (S.D.N.Y.); *State* v. *Terry*, 5 Ohio App. 2d 122, 214 N.E. 2d 114.

[16] *State* v. *Terry*, (*ibid.*); *United States* v. *Thomas*, 250 F. Supp. 771, 785 (S.D.N.Y.).

[17] *Lee* v. *United States*, 221 F. 2d 29, 30 (C.A.D.C.); *United States* v. *Bonanno*, *supra*, page 11.

[18] *United States* v. *Bonanno*, (*ibid.*).

The sum total of all the suggestions brings one back to the terms of the Fourth Amendment itself—a protection against "unreasonable" searches and seizures. What is reasonable or "unreasonable" must necessarily vary with differing times and differing situations.

Similarly, it is impossible to define with exactitude the permissible extent of a detention not amounting to an arrest. Once more, we submit, the constitutional standard must be one of reasonableness under the circumstances. When the suspected offense is not serious and a modicum of essential information (*e.g.*, the suspect's identity and address) has been obtained, so that the police would suffer little more than inconvenience if the citizen were permitted to go his way, it is reasonable to restrict the allowable period of the detention to very narrow limits. Conversely, where the person is unknown to the police, the offense under investigation is serious, and the suspect's explanation is equivocal, a detention for a somewhat longer (though not protracted) period would seem proper, at least where the questioning is on the scene.[19]

The duty imposed upon policemen by society to investigate and deter crime requires that they be allowed to question individuals whom they have reasonably stopped. *Trilling* v. *United States*, 260 F. 2d 677, 701 (C.A.D.C.). This Court, in *Miranda* v. *Arizona*, 384

[19] A discussion of the time limits stated in various statutes lasting from twenty minutes (Draft for a Model Code of Pre-Arraignment Procedure) to four hours (New Hampshire Laws Sec. 595:2) would, for our purposes, be of no import. We agree with the First Circuit that a State's statutory time provision does not, *ipso facto*, create a constitutional standard. *Hancock* v. *Nelson*, 363 F. 2d 249 (C.A. 1).

U.S. 436, enunciated certain procedural safeguards to be employed "when an individual is taken into custody or otherwise deprived of his freedom by the authorities * * * and is subjected to questioning." 384 U.S. at 478. At the same time, the right of policemen to conduct "[g]eneral on-the-scene questioning of citizens" was noted, this Court stating that responsible citizenship required citizens to give whatever information they may have to aid in law enforcement. 384 U.S. at 477–478. It appears, therefore, that the Court, in *Miranda,* did not consider an on-the-street detention based upon reasonable suspicion to constitute "custodial interrogation", thereby requiring the officer to inform the suspect of his rights to silence and counsel. 384 U.S. at 477. See *Brown* v. *United States,* 365 F. 2d 976, 979 (C.A.D.C.); *United States* v. *Davis,* 259 F. Supp. 496 (D. Mass.). Perhaps, an admonition should be required when the questioning becomes sustained and moves from what might be termed preliminary investigation to a focus on the individual as a criminal. We believe, however, that in the usual type of street investigation *Miranda* does not apply. We assume that a refusal to respond to a policeman's questions is a neutral act and will not establish probable cause to arrest where it would otherwise be lacking, *United States* v. *Vita,* 294 F. 2d 524, 531 (C.A. 2), certiorari denied, 369 U.S. 823; see *United States* v. *Bonanno, supra,* 180 F. Supp. at 76; cf. Perkins, *The Law of Arrest,* 25 Iowa L. Rev. 201, 259 (1940). This does not, however, seem to us to require a

Miranda-type warning every time a policeman asks a question.[20]

II. A POLICE OFFICER CAN LAWFULLY "FRISK" A SUSPECT WHEN THE CIRCUMSTANCES ARE SUCH THAT HE REASONABLY APPREHENDS DANGER FROM A HIDDEN WEAPON

In keeping with our view that the question at issue here is reasonableness under the Fourth Amendment, we think it unimportant whether a frisk is denominated a search; rather, the question is whether, even assuming that it is a search, it is reasonable. In our view, when a person is lawfully detained for questioning (albeit on less than probable cause), a police officer is warranted in patting down the outer clothing of the suspect if the circumstances are such that he reasonably apprehends that the person detained may have a dangerous weapon at hand.

In those limited circumstances, we think a frisk can be deemed a reasonable search under the Fourth Amendment. The invasion of privacy or interference with liberty is slight.[21] Moreover, the detention which occasioned the frisk must be based on the founded

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[20] Whether other acts on the part of the detained suspect—such as seeking to avoid the detention, giving obviously false answers, or displaying objects of potential use for criminal purposes—would justify a formal arrest must necessarily be determined in the context of a particular situation. The sum total of the circumstances arising after the detention has occurred, when combined with the factors existing at the time of the detention, may create probable cause for such an arrest. *Brinegar* v. *United States*, 338 U.S. 160; *Rios* v. *United States*, 364 U.S. 253.

[21] Compare the statement in *Camara* v. *Municipal Court*, 387 U.S. 523, 536–537, that "there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails."

suspicion that the individual might be, or has been, involved in a serious act. The justification of the frisk itself is to protect the officer acting in pursuit of his lawful duties. In our day, when the size of a weapon has no relationship to the harm it can inflict, the need of the police for such protection is substantial, as numerous judges and commentators have recognized. *State* v. *Moore,* 187 A. 2d 807 (Del.); *Commonwealth* v. *Hicks,* 209 Pa. Super. 1, 223 A. 2d 873; Leagre, *The Fourth Amendment and the Law of Arrest,* 54 J. Cr. L., C. & P.S. 393, 419 (1963); Warner, *The Uniform Arrest Act,* 28 Va. L. Rev. 315, 324 (1942); Younger, *Stop and Frisk: Say it Like it Is,* 58 J. Cr. L., C. & P.S. 293 (1967).

Opponents of stop-and-frisk authority stress the possibilities of abuse. We do not minimize that danger, although we note that this is inevitably true of almost all police procedures, and, perhaps, as Lord Acton suggested, of almost all exercises of authority by the State. The reconciliation of the need for the power and the danger of its abuse must be found in the development of rules and practices which fix sensible limits and in the diligent supervision of the courts.

We urge no right to search a person for contraband when he is detained on less than probable cause. However, when the type of frisk which we regard as lawful—a patting down for weapons—does reveal the existence of weapons, we see no sound reason why the weapon so discovered may not be introduced in evidence or provide the basis of a prosecution. At the moment the peace officer uncovers, pursuant to a frisk,

an item which the suspect unlawfully possesses, a crime is being committed in the officer's presence. It would be irrational to prohibit prosecution of that offense, merely because in the first instance the suspect was detained—lawfully—on less than probable cause. Police have the responsibility to detect crime. If the means of detection are not unconstitutional, there is no reason to construct an exclusionary rule to benefit the suspect who has been discovered committing a criminal offense in the presence of a police officer. The interests of society are not adequately served merely by removing the dangerous weapon from the suspect's person and sending him on his way.

In cases where searches and seizures have been held violative of the Constitution, the subject matter discovered by the illegal procedure has been excluded from evidence in order to deter the police from resorting to illegal methods. *Weeks* v. *United States,* 232 U.S. 383; *Mapp* v. *Ohio,* 367 U.S. 643. A similar exclusionary rule would manifestly be inappropriate for items uncovered by *lawful* frisks. On the contrary, the customary rules of evidence should govern, and such evidence, if otherwise admissible, should be received.

Nor is there any reason to restrict the admissibility of evidence obtained from frisks to weapons so long as the frisk had a legitimate purpose and was not a mere excuse to search the person on less than probable cause. Once more, meaningful reference can be made to situations involving evidence seized in a lawful search based upon probable cause or incident to an arrest. If a frisk has been properly conducted and found to be legally justifiable, the mere fact that the

expectations of an officer seeking a dangerous weapon were not realized, and that a suspect's covered pocket concealed some other unlawfully possessed object, should not prevent the officer from removing what he has found. *Harris* v. *United States,* 331 U.S. 145, 155; *Abel* v. *United States,* 362 U.S. 217, 238.

In sum, we believe that it is consistent with the Fourth Amendment to recognize a power in law enforcement officers to detain and question under circumstances amounting to less than probable cause for a formal arrest, and that, in exercising such power, the officer may legitimately protect himself by a frisk for dangerous weapons.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
RALPH S. SPRITZER,
Assistant to the Solicitor General.
BEATRICE ROSENBERG,
MERVYN HAMBURG,
Attorneys.

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